AW YONG WAI CHOO & ORS.

v.

ARIEF TRADING SDN. BHD. & ANOR.

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[HIGH COURT CIVIL SUIT NO. 753 OF 1982 CONSOLIDATED WITH 93/82, 687/82, 688/82, 689/82, 692/82, 693/82, 696/82, 710/82, 711/82, 712/82, 752/82, 754/82, 756/82, 757/82, 759/82, 762/82, 763/82, 764/82, 766/82, 768/82, 769/82, 782/82, 783/82, 784/82, 786/82, 787/82, 789/82, 791/82, 793/82, 794/82, 795/82, 10/83, 20/83, 57/83 & 659/83]
21 SEPTEMBER 1991

CONTRACT: *Sale and purchase agreement - Landowner not party to agreement - Breach of Housing Rules - Whether rendered contract defective - Breach by developer - Landowner took over project - Assignment of sale and purchase agreement - Whether agreement can be enforced against landowner - Legality - Benefit enjoyed by plaintiffs - Whether gratuitously or lawfully done by landowner - Contracts Act 1950, ss. 24, 71 - Housing Developers (Control & Licensing) Rules 1970, r. 11(i).*

EQUITY: *Estoppel - Equitable - Test - Unconscionable to insist on strict enforcement of contractual obligations.*

PARTNERSHIP: *Test to determine - Real intention of parties - Conduct of parties before and after execution of agreement - Partnership Act 1961, ss. 3(1), 4.*

This hearing involved 36 suits which were consolidated; the plaintiffs being the 36 house buyers, the first defendant, a housing developer (D1) and the second defendant, the subsequent landowner (D2). It was agreed between the parties that since all the plaintiffs' actions were the same, the first plaintiff (PW1) would give evidence on behalf of all.

All the plaintiffs had entered into sale and purchase agreements with D1 and had paid 10% towards the purchase price. The first plaintiff's agreement P1 was used as evidence. It is alleged by the plaintiffs that D1 did not complete the project within the time period stated in P1 and further that D1 and D2 were partners of this joint venture project, and that in a brochure distributed to the house buyers, D2 was stated to be the registered proprietor of the said land. However in P1, the only party referred to as the proprietor was D1.

As a pre-condition to complete the project, D2 requested an increase in price for each unit of house. As the buyers did not agree, a pro-tem committee was set up to commence legal action.

Subsequently, D2 offered to settle by building the houses with an increase of 50% in the original purchase price or the payment of RM30,000 each. Caveats were lodged by the plaintiffs against the said land.

Evidence was adduced of an agreement in existence between D1 and D2 (P4) which governed their relationship and of the fact that D2 had applied for the land in question and that it was directed by the Perak State Government (PSG) to allow D1, a Bumiputra company, to develop it, under certain terms which would benefit the Bumiputras. As a result of problems in the completion of the project, D2 decided to take over the project and D1 assigned P1 to D2.

PW1 claimed specific performance of P1 against D1 and D2, claiming that by virtue of P4, the contracting parties became partners in the business of developing and building houses on the said land. She also claimed an injunction against disposal of the said land, and damages.

D2 submitted that as it was not a party to P1, it could not be liable on P1 and further that the owner of the land was in fact the PSG. In addition, they argued that P1 was unenforceable as it was illegal because it failed to comply with r. 11(i) of the Housing Developers (Control and Licensing) Rules 1970 (the Rules) as it did not make the owner, PSG, a party to P1. It was also stated that there was no intention by D1 or D2 to be partners to the project.

Held:

[1] A breach of r. 11 of the Rules did not, by s. 24 of the Contracts Act 1950, render illegal a purchase agreement whereby the landowner was not a contracting party to the sale and purchase agreement.

[2] To determine whether a partnership existed, the real intention of the parties must be examined. The real intention is not necessarily the expressed intention of the parties so that even if the parties express the fact that they are partners, the Court may decide to the contrary after all relevant factors are taken into consideration.

[3] The conduct of the parties, all occurring before and after the signing of P4, should be considered together with P4, as the Court's function was not solely confined to interpretation of P4 but to the larger question of whether a partnership existed as defined by s. 3(1) of the Partnership Act 1961 (the Act).

[4] After a thorough consideration of P4, the brochures which were distributed to potential housebuyers and all evidence, the Court was satisfied on a balance of probabilities that the indicia of partnership outweighed the negative factors and that a partnership existed between D1 and D2 as defined under s. 3(1) of the Act, in relation to this project.

[5] Although the Court ordered specific performance of P1, it did not order the payment of indemnity or liquidated damages for late delivery of the houses against D2, using the benefit the plaintiffs gained as a set-off against the plaintiffs' own claims for such indemnity. This was because the houses had all been built and completed by D2 employing new and more expensive specifications - D2 did so in a way which could not be considered to be unlawful, nor was it intended to be gratuitous.

[6] However, such indemnity was ordered against D1, thus making a distinction between a defaulting trading partner and a sleeping partner who had subsequently given more to the plaintiffs than what the defaulting trading partner had given.

[7] It was unconscionable for the plaintiffs to insist on strictly enforcing the obligation providing for the payment of the said liquidated damages for late delivery of houses.

[Specific performance ordered against D1 and D2; D2 need not pay indemnity for late delivery of houses; consequential directions; costs against D1 and D2.]

Cases referred to:

Kin Nam Development Sdn. Bhd. v. Khau Daw Yau [1984] 1 CLJ (Rep) 181 ***(cons)***
Cox v. Hickman [1860] 8 HCL 268 ***(cit)***
Mollwo March & Co. v. The Court Wards [1872] (LR) 4 PC 4197 ***(cons)***
Palanivelu v. Neelavathi & Anor. [1937] AIR. Journa, 50 ***(cit)***
Ganapathi Pillai v. Budayasamy [1952] AIR 49 ***(cit)***
Subramaniam v. Thayyappa [1961] 1 Mad LJ (SN) 30/SC) ***(cit)***
Shaw v. Applegate [1977] 1 WLR 970 ***(foll)***
Gan Tuck Meng & Ors. v. Ngan Yin Groundnut Factory Sdn. Bhd. & Anor. [1990] 1 MLJ 227 ***(cit)***

Legislation referred to:
Contract Act [Ind] s. 70
Contracts Act 1950, ss. 24, 71
Housing Developers (Control and Licensing) Rules 1970, r. 11(i)
Partnership Act 1961, ss. 3(1), 4

For the Plaintiffs - H.R. Sankey; M/s. H.R. Sankey & Co.
For the Defendants - Jeya Palan (Paul Subramaniam with him); M/s. Maxwell, Kenion, Cowdy & Jones.

JUDGMENT

Peh Swee Chin J:

A long wrangle among some 36 house buyers, (hereafter called the plaintiffs); the housing developer (hereafter called the developer) and the subsequent land owner in question (hereafter called the corporation) finally landed in Court which heard 36 civil suits all consolidated on the very day of hearing, all with a common cause of action, all against the developer and the corporation giving rise to common questions of law and fact.

Before evidence *viva voce* commenced, the Court discussed with all Counsels and with their commendable co-operation, made a consent order *inter alia* (a) that all the 36 cases be consolidated forthwith; (c) that one only of 36 plaintiffs need give evidence for the time being as the evidence for all other plaintiffs, who would have given similar evidence, and (c) that any other witness may, if necessary, be called, examined and cross-examined. The consent order was of course to save valuable time. This object is believed to have been achieved.

Thus plaintiff in Civil Suit No. 753/82, one Miss Aw Yong Wai Choo gave evidence on behalf of all in all the controversial aspects of the case. The developer, that is the same 1st defendant in all consolidated cases, was not present neither was it represented by Counsel. The corporation, that is the 2nd defendant in all the consolidated cases, took up the cudgels for itself in what appeared to be a mess left behind by the developer who had made itself completely scarce leaving so many people in the lurch.

PW1, that is Miss Aw Yong, said she signed an agreement on 24 July 1979 for the purchase of her house and the agreement P1 was produced (similar agreements for all other plaintiffs). The house was not completed, within 18 months thereafter as provided in the agreement, and in fact the construction of it was not even started within the same period. She took up the matter with the developer and was told that it had some problem with the local authority. She made a complaint to the Ministry of Housing and Local Government. Then the corporation called for a meeting with all similar buyers in similar straits. At the meeting the corporation asked for an increase in price for each unit of the house and further, that if such increase was accepted, a new purchase agreement would have to be signed. The increase in price was not agreed to and buyers of some 313 units formed a pro tem committee to take up legal action.

In a civil suit (not one of those consolidated herein) a house buyer obtained summary judgment against both the present developer and the corporation and the corporation herein had appealed to the then Federal Court but the appeal was withdrawn. After withdrawal of the appeal, the corporation offered to settle each of the claims of the plaintiffs by building the house with an increase of 50% of the original purchase price over and above the original purchase price or alternatively, paying to each RM30,000.

This evidence of offer of RM30,000 was objected to as being made without prejudice and the Court decided that the evidence could be accepted for the time being until there was later evidence to say that it was made without prejudice and if such later evidence was accepted, and then in that event, it would be totally excluded from the deliberation of the Court. In the event that had turned out, there was no further specific evidence to buttress this objection.

She said she had lodged a caveat against the land in question. On being asked by the Court, learned Counsel for the corporation informed the Court that the corporation had on its own accord built and completed building the houses.

After conclusion of all the evidence, and on a day subsequent to it, the Court called for all Counsels to be present in chambers where it appeared to be agreed on all hands that all the houses had been built for all the plaintiffs in the actions consolidated herein and that at the same time the plaintiffs had merely each paid 10% of the purchase price in each case. All this information, consisting of undisputed issues, not fully referred to in evidence, was vital to the Court before it could make what was in its opinion, a just and fair decision.

To revert to Miss Aw Yong's evidence, she also said that there was a sign board at the work site stating that it was a joint venture between the developer and the corporation. Before buying the house, she was given a brochure (P7) by which she knew the corporation was the registered proprietor of the land in question. The brochure came with a schedule of payments given by the developer.

Under cross-examination, she agreed that the vendor in the agreement (P1) was the developer which was the only contracting party with her. She agreed there was nothing in the agreement to say that the developer was a partner with anybody else. She agreed that she took the developer on reading the agreement, as the proprietor of the land. She said that the words (in the agreement) stated that the developer was (authorised by) the registered proprietor. She said she knew from the brochure that the corporation was the registered proprietor and she agreed that the corporation was not a party to the agreement and there was nothing in it to suggest that the corporation was a partner to the developer. She said she had paid 10% (towards the price mentioned in the agreement).

She said, *inter alia*, that the date of the agreement was 24 July 1978 and the house was delivered to her on 23 January 1980. She understood that the housing scheme (of which her house formed a part) was the corporation's project. She highlighted the express words, to the effect, about the joint venture being between "Perbadanan Kemajuan Negeri Perak" (that is the corporation) as owner and "Arief Trading" (that is the developer) as developer as printed on the brochure (P7).

She agreed further that the present house delivered to her was built by the corporation itself and not by the developer and she agreed that the specifications of the corporation relating to the said house were not the same as those of the developer. She agreed that the word of "partnership" was not printed in the brochure (P7) or the schedule of payments (P8). She said she did not know that the withdrawal of the appeal mentioned earlier in question from the Federal Court was the result of an amicable settlement between the corporation and that house buyer called Mr. Hew, by way of an *ex-gratia* payment without admission of liability and that the said Mr. Hew had assigned his agreement with the developer to the corporation, but she did not know that the appeal was withdrawn as a result of compromise. Out of the house buyers, she agreed only 38 were still pursuing Court action. She said the said 38 house buyers insisted on the houses being completed at the original price.

Encik Ismail, that is DW1, a former employee and former manager of building and housing department of corporation at the relevant period stated that the corporation applied for the land in question (then State land). The letter of approval (P18) dated 19 April 1977 was received by him with a request to pay quit rent and premium totalling RM383,700. He said they had wanted to develop the said land into a housing scheme on their own. The corporation was incorporated by the Perak State Development Corporation Enactment 1967 and it did not require a developer's licence. He said further that they were directed by the State Government of Perak to allow the developer, a Bumiputra company to develop it instead as the Government wanted to give an opportunity to Bumiputra developers and the developer had agreed to donate part of the profit to Arief Institute of Education; to reserve 30% of houses built for Bumiputras and to give opportunity to Bumiputra building contractors. DW1 then referred to and highlighted various clauses of P4, an agreement between the corporation and the developer dated 29 December 1977 governing the relationship between the corporation and the developer. P4 was introduced into evidence by PW1 earlier and on the basis of it, she said she was advised to sue the corporation as well as the developer, (*vide* p. 4 of the notes of evidence). He said that the corporation was to get 50% of the profit from the developer which developed the land and built the houses at the latter's entire own cost.

He said further that in early 1979, questions were raised in the Perak State Legislative Assembly on the housing scheme and on the problems faced by the house buyers and they decided to look into the problem trying "to salvage the project" and they decided to take over the management of the project "to protect the funds of the purchasers". They entered into a formal agreement with the developer (to give effect to the take-over of the housing scheme). They found that estimates of the developer were far below the price on which they could build houses. They decided to build the houses "on their own" and to sell them below "the market value" but higher than those prices which the developer had intended to sell for. The developer then "assigned" the agreements with the house buyers to the corporation. DW1 said further that under P4, the earlier agreement of the corporation with the developer, the developer had complete control of the management and finance of the project and the corporation was not liable for any liabilities of the developer. He referred to the house buyer called Mr. Hew with whom they had settled on certain payment without admission of liability by means of D25, that is expressly stated to be by way of an *ex-gratia* payment without admission of liability whatsoever in full settlement by reference to the relevant civil suit and the Federal Court Civil Appeal (with particulars supplied). There were 313 purchasers, and they managed then to "solve problem" with 201 purchasers. He had never received earlier estimates and specifications of the developer from the developer. The gentleman called Arief (incorporated into the name of the developer) was from Indonesia and he did not know whether this man was a citizen. He said to the effect that the estimates of the developer were so low that the corporation demanded an extra increase of 50%.

DW2, that is Dato' Hamdan, said he was the general manager of the corporation and he had executed P4 with the developer and the other signatory of the corporation was the then Menteri Besar. He said that the corporation was a statutory agency of the State Government formed in line with New Economic Policy with a view to restructuring society. The corporation had the ability and experience to develop housing schemes. The developer was to pay 50% of its profit to the corporation.

In cross-examination, Dato' Hamdan denied that P4 was intended to be a business arrangement; if it was, he said it would be better to sell the whole land to the developer and further it was not a joint venture, if it was, they would put up a joint venture company. It

was simply to allow Encik Arief to develop the land to achieve the true object of helping Bumiputras and Arief, who even though Indonesian was still Bumiputra and was so regarded by the corporation. He didn't know if the said Arief was carrying an Indonesian passport.

It would not be necessary for the purpose of this case to comment on P1, the building agreement between PW1 and the developer apart from saying that it was a fairly standard type of sale and purchase agreement of a house with all the usual provisions in which the developer was described as "vendor" in possession of a developer's licence and "that ... the vendor is (authorised by) the registered proprietor of the land ..." as these words were referred to in the evidence of PW1.

P4, the agreement between the corporation and the developer would have to be set out below for ease of reference as it was without doubt the bone of contention between the plaintiffs and the corporation.

This agreement is made this 29 December 1977 Between The State Economic Development Corporation Perak a body corporate established under the Perak State Development Corporation Enactment 1967, of Club Road, Ipoh (hereinafter called "the corporation") of the one part, and Arief Trading Sendirian Berhad, a company registered in Malaysia and having its registered office at 2100, Wisma Central, Jalan Ampang, Kuala Lumpur (hereinafter called "the developer") of the other part.

Whereas the Government of the State of Perak is the owner of a parcel of Land for Lot 46330 & Adjoining State Land in the Mukim of Ulu Kinta in the District of Kinta as in the plan attached hereto and marked in red (hereinafter called "the said land") and which consists of an approximate area of 26 acres.

And whereas the Government of the State of Perak is desirous of leasing the said land to the corporation for a period of 99 years for the purpose of developing the said land into a housing scheme to which the corporation has agreed.

And whereas the corporation has agreed to allow the developer to develop the said land upon the terms and conditions hereinafter contained.

Now this Agreement Witnesseth and it is hereby Agreed and Declared as follows:

1. In consideration of the developer agreeing that the corporation shall have 50% of the profits of the development, the corporation shall, at the cost of the developer, obtain the relevant leases to the said land in lots to be set out in the layout plan specified in clause 3 hereinafter from the Government of the State of Perak for a period of 99 years and to allow the developer at the cost of the developer to develop the said land as a housing scheme in accordance with plans and specifications to be approved by the local authority and on the terms and conditions hereinafter contained.

2. The developer hereby undertakes to be solely responsible for the finance and to seek the necessary financial resources for the whole of this project.

3. Immediately upon the execution of this agreement the developer shall provide the corporation a layout plan of the entire area for the development of the said land as a housing scheme for the approval of the relevant authority.

4. Upon the approval of the relevant authority of the layout plan under clause 3 above, the developer shall immediately cause to be prepared for the approval of the local authority plans, elevations, sections and drawings for the erection of the said housing scheme on the said land together with an outline specification or specifications of the approved method of construction and of the materials to be used.

a 5. Upon signing of this agreement the developer shall be at liberty to enter upon the land for the necessary levelling and other preliminary works concerned therewith.

6. The developer shall submit to the corporation for approval the estimates and specifications of the buildings and infrastructure and the selling price.

7. The appointment of the contractor or contractors for the works in para. 6 above shall be done jointly by the corporation and the developer.

b 8. The appointment of consultants that is architects, engineers, surveyors, etc., by the developer shall be with prior consultation of the corporation.

9. Upon the approval of the plans and specifications by the relevant authorities the developer shall have the authority to commence construction upon the said land for the development of the housing scheme.

c 10. The developer shall from the date of this agreement be liable to advance the payment for all premiums, rates, claims, assessments and other out-goings now or hereafter at any time chargeable against the corporation by statutes or otherwise in respect of the said land and shall obtain all permissions and consents required and shall comply in all respects with the statutory instruments, rules, orders and regulations for the time being in force relating to planning control and with any orders, directions and notices, made or given thereunder and in particular with the conditions imposed by any permission for the development and also with any other Acts, bylaws and regulations affecting the same and shall do all such works and things as shall be lawfully required thereby and pay and indemnify and keep indemnified the corporation against all fees, charges, penalties and expenses to be made or incurred thereunder.

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11. The developer shall at all times do all acts and things required by and to conform in all respects with the provisions of any statutes land building regulations applicable thereto and in accordance with the lawful requirements of any statutory provisions in respect of electricity, water, telephone or other public services.

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12. The developer shall make good at its own expense any damage caused to the public highways or adjoining properties and sewers, drains, cables and other works thereon and thereunder through the construction of the said housing scheme. Not to deposit or permit to be deposited upon the public highways or adjacent land any building or other materials and to comply with all instructions of the local or other authorities.

f 13. The developer hereby undertakes not to erect or build or permit or suffer to be erected or built on the said land any building structure or erection otherwise than in conformity with the approved plans and specifications and not to make any material alterations without the previous consent of the corporation and the local authority.

14. The developer shall during the carrying out of the development insure and keep insured the same in a sum sufficient to cover the cost of completely reinstating the same in the event of total destruction together with architects' and surveyors' fees and other expenses incidental thereto against loss by fire, lightning, flood, storm, tempest, commotion, riots, explosion and in times of peace, aircraft and articles dropped therefrom a reputable insurance company to be approved by the corporation and to pay all premiums and other monies necessary for this purpose and whenever required to produce to the corporation the policy or policies of such insurance and the receipt for every such payment and in the event of the development or any part of parts thereof being destroyed by fire or damage as aforesaid, then as often as the same may happen to secure that all monies payable by virtue of such insurance shall with all convenient speed be laid out and applied to rebuilding, repairing or otherwise reinstating the development in good and substantial manner in accordance with the terms of this agreement and not to do or permit to be done upon the said land anything which may render the policy or policies of insurance void or voidable or make any increased premium payable in respect of such policy or policies.

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15. The developer hereby undertakes to complete the development to the reasonable satisfaction of the local authority in accordance with the plans and specifications with all practicable speed and in any event within two (2) years from the date of approval of plans and specifications, electricity and water supplies. In the event of flood and riots or any matters beyond the control of the developer, it shall be extended as recommended by the architect to be agreed upon by both parties.

16. The corporation hereby agrees and undertakes that as soon as the said land has been surveyed and sub-divided into housing lots, to endeavour with all reasonable dispatch to have each and every of the said sub-lots issued with Qualified Titles.

17. The corporation shall upon receipt of the Qualified Titles transfer them to the purchasers at the request of the developer who shall confirm that all arrangements for securing the necessary finances for the said land and house has been finalised and will be secured by registration of the transfer to the purchasers and charge to the financier at one and the same time.

18. In the event of shortage of any building or other material for the use of the project and on the developer so informing in writing to the corporation of such shortage, the corporation hereby undertakes to assist the developer in every possible way to obtain such building or other materials from the relevant companies.

19. The corporation hereby undertakes that to expedite and facilitate the smooth functioning and working of the development, it will assist the developer in every possible way in obtaining from the appropriate authorities the following:

(i) Approval of the layout plan for the project;

(ii) Individual titles for the sub-divided lots of the said land;

(iii) Approval of all building and engineering plans;

(iv) Certificate of Fitness for all completed buildings;

(v) Laying and supplying of water mains, electricity and telephone cables.

20. The developer shall be responsible for processing, approving and allotting the houses and/or shophouses to the successful applicants and to stipulate the period upon which the deposit shall be paid and to collect and receive all deposits for such sales. The list of selected applicants shall be submitted to the corporation for approval. All preparation of sale agreement shall be done by the developer's and the purchasers' solicitors.

21. It is hereby mutually agreed that not less than thirty per centum (30%) of the number of houses, and/or shophouses shall be reserved for Bumiputras to be taken within six (6) months from the date of laying the foundation of the said houses and/or shophouses. If such allocation is not fully taken up by Bumiputras within the prescribed time, the developer shall be at liberty to sell the remaining houses or shophouses to any other person.

22. The corporation through their general manager, and/or any officer of the corporation authorised by the corporation reserve the right to enter and inspect the said project from the date of implementation to the date of completion to ensure that all specifications are strictly adhered to.

23. All costs relating to this agreement or anything arising therefrom or anything connected therewith shall be advanced and paid by the developer as part of the development costs for the project.

24. The developer shall maintain proper books of account from the commencement to the conclusion of the housing scheme for all income and expenditure which books shall be subject to audit before the final division of the nett profits stated in clause (1) hereof and during which period the corporation by its general manager or authorised officer shall at all reasonable times be entitled to inspect the said books of account.

25. Time wherever mentioned in this agreement shall be the essence of the contract.

26. Any notice or request to be given or made under this agreement to the corporation or to the developer shall be in writing and in the case of the corporation shall be under the hand of the general manager, the secretary and/or solicitor or firm of solicitors purporting to act on their behalf and in the case of the developer under the hand of the managing director, secretary and/or solicitor or firm of solicitors purporting to act for the developer to their respective addresses.

27. All notices shall be deemed to have been sufficiently given or made if sent by registered post and addressed as aforesaid and shall be deemed to have been served on and duly received by the other party in the ordinary course of post.

28. This agreement shall be binding upon the respective representatives, successors in title and assigns of the parties hereto.

In Witness Whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

The Common Seal of the State Economic Development Corporation) Perak duly affixed in the presence of:)

Sgd.
Pengerusi
Perbadanan
Kemajuan
Negeri, Perak,

Sgd.
Pengurus Besar,
Perbadanan Kemajuan Negeri
Perak.

The Common Seal of Arief Trading Sdn. Bhd. duly affixed in the presence of:

Chop Arief Trading Sdn. Bhd.
Sgd.
Managing Director

Chop Arief Trading Sdn. Bhd.
Sgd.
Secretary.

In the statement of claim of PW1, she claimed that by virtue of the agreement dated 29 December 1977 made between the corporation and the developer, that is P4 aforesaid, the contracting parties thereto became partners in the business of developing a housing estate and building houses on it on the land in question. Her statement of claim further claimed that under P4, the developer for the mutual benefit, entered into the agreement with PW1 to build and sell to PW1 and that the house was to be built and completed on or before 23 January 1980. The developer, it was said, failed to fulfil its obligations when PW1 had been readily willing and able to fulfil hers. She therefore claimed specific performance of the agreement (P1), injunction from disposing of the land in question and alternatively damages, etc.

The corporation in its defence by its reference to provisions of P4 and other factors denied it was even a partner with the developer, and denied any liability on P1, the agreement to which it was not a party at all, it had merely sought to help the plaintiff as a social or moral

duty and that the market value of each house was over RM46,000 whereas the developer had sold the same for RM35,300 and that the statement of claim disclosed no cause of action against the corporation.

In the submission of the corporation, it was submitted that the corporation was not a party to P1 while the developer was the vendor of the land, the house to be built thereon. The owner of the land was in fact the State Government of Perak, it was State land at the time of signing of P1 and the corporation merely became the registered proprietor in 1981. PW1 knew at the time of signing P1 that the corporation was not the landowner and she had no dealings with the corporation until 1982 and the house was subsequently constructed by the corporation on the same site on the corporation's own specifications. Further it was never the intention of PW1 to enter into P1 with the corporation and the only remedy of PW1 was to sue the developer alone. Learned Counsel cited authorities to the effect that a party not being a party to a contract could not be sued on the contract. I would call this the first point raised by the corporation.

The second point, if I may call it as such, raised by the corporation was that the aforesaid "P1" was unenforceable as it was illegal because of failure to comply with the r. 11(i) of the Housing Developers (Control and Licensing) Rules 1970 by not making the landowner as a party to the agreement of sale between the developer and PW1 and PW1 could have by a search in the Registry of Titles found the landowner to be State Government of Perak and that State Government was not made a party to the agreement.

The third point was that there was no intention by the corporation or the developers to be partners to the project and that from the circumstances leading to P4, and the evidence called for the defence it was clear that no partnership of any kind was intended and in particular the share of profit on the 50/50 basis was not a conducive test.

The 4th point was that the case of appeal in the Federal Court was settled without any admission of liability and therefore not relevant, and further that Mr. Hew's case there was decided on different issues and on issues not pleaded before the Court here.

The answer of the learned Counsel for the plaintiffs was as comprehensive as it was laconic. It was submitted that after reading P1 and P4, it was clear that the corporation was the land owner and that the corporation was the "silent" partner to the developer. Learned Counsel referred to various clauses of P4 to support his contention of a partnership between the corporation and the developer, and the corporation was therefore liable as partner towards the plaintiffs.

Dealing with the first point raised about the corporation not being a party to the contract that is P1, and about the plaintiffs not being permitted to sue the corporation on P1, the reply of the plaintiffs was crystal clear. It was that the plaintiffs were suing the corporation as a partner of the developer to make the corporation liable as partner for the debts and liabilities incurred by the developer.

In connection with the second point about the contract being illegal and unenforceable for breach of the r. 11(1) of the then Housing Developers (Control & Licensing) Rules 1970 by not making the State Government of Perak as landowner at the time of the contract, as a party to the P1, this point I am afraid is no longer an arguable point by virtue of the decision of the Federal Court in *Kin Nam Development Sdn. Bhd. v. Khau Daw Yau* [1984] 2 CLJ (Rep) 181 in which the Federal Court *inter alia,* confirmed the decision of the lower Court that such an agreement was still enforceable by the purchaser there, to the effect that the

breach of the r. 11 did not by s. 24 of the Contracts Act 1950 render such purchase agreement illegal. With the greatest respect, the Federal Court was certainly right; just to give a well-known example, how chaotic it would be, that all the agreements made by a company, would be declared void just because the company failed to file annual accounts with the Registrar of Companies?

I would deal with the 3rd point about the absence of a partnership later in detail; but would deal with the fourth point here and now. The 4th point was as regards the case of appeal in the Federal Court from a summary judgment obtained by the said Mr. Hew in one case not consolidated herein. In view of the Court's finding that a partnership did exist between the corporation and developer as found from all the evidence without having to depend at all on any evidence relating to this Mr. Hew's case, it would not be necessary to deal with the 4th point, although it would have been difficult to deal with this point as no submission was heard on the legal consequences of such evidence, though the Court could hazard a guess that it was related to issue estoppel, but was it?

Dealing with the 3rd point, in my opinion, if it had been proved that the corporation and the developer were partners, then the principle of a partner being liable for the debts and liabilities incurred by another partner in the course of the partnership applied, then the action against the corporation would succeed if the plaintiffs succeeded in proving the claims against the developer, subject however to unfortunately an extraordinary situation which had arisen on the facts of this case, and I would deal with this extraordinary situation and the special treatment for it in detail later on.

I had no doubt that the plaintiffs had proved more than enough to induce this Court to grant specific performance as claimed in the writ against the developer.

The burning question however remained, that is were the corporation and the developer partners?

Partnership is first of all defined in our Partnership Act 1961 by s. 3(1) as follows:

> 3(1) Partnership is the relation which subsists between persons carrying on business in common with a view of profit.

Section (4) says:

> In determining whether a partnership does or does not exist, regard shall be had to the following rules:
>
> (a) joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof;
>
> (b) the sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived;
>
> (c) the receipt by a person of a share of the profits of business is *prima facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular:
>
> (i) the receipt by a person of a debt or other liquidated amount, by instalments or otherwise, out of the accruing profits of a business does not of itself make him a partner in the business or liable as such;

(ii) a contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such;

(iii) a person being a widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not, by reason only of such receipt, a partner in the business or liable as such;

(iv) the advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits, arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such;

Provided that the contract is in writing and signed by or on behalf of all the parties thereto; and

(v) a person receiving, by way of annuity or otherwise, a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not, by reason only of such receipt a partner in the business or liable as such.

From the sections quoted above, it would be apparent that in order to find if partnership exists, it would be necessary to determine if the relation as defined in s. 3(1) exists.

In my view to find the existence of such relation, the Court must find the real intention of the parties involved. The real intention is not necessarily the expressed intention of the parties so that even if the parties express they are partners, the Court may decide to the contrary after the Court considers all relevant factors taken together, please see the leading case of *Cox v. Hickman* [1860] 8 HCL 268.

The definition section really sets out the essence of the decided cases that is the Court is perfectly at liberty to determine from all the relevant factors taken together, if such relation exists or does not exist, then the Court attributes this finding as the real intention of the parties. This has nothing to do with curbing contractual freedom but is meant for doing justice. Sir Montague Smith said in the case of *Mollwo March & Co. v. The Court of Wards,* [1872] (LR) 4 PC 419 at p. 438 said:

> If cases should occur where any partnership, under the guise of such an arrangement (that is a loan), are really trading as principals, and putting forward as ostensible, others who are really their agents, they must not hope by such devices to escape liability; for the law in cases of this kind, will look at the body and substance of the arrangements and fasten responsibility on the parties according to their true and real character,

so much for the attributable real intention of the parties.

I will also express my view on some other matters before proceeding to my findings. First, with reference to the rules for which the Court shall have regard to in determining the question of the existence or non-existence of partnership as expressly stated in s. 4 quoted above, in my view the stated rules cannot be exhaustive at all, for the category of such similar rules is never closed certainly; there are far more pigeon-holes than the stated rules for factors to fit into them.

Further in my view the relevant factors to be taken together for consideration are those happenings of the relation between the parties, that is all the relevant incidents of the relation, including any written or verbal agreement, conduct of the parties at all times, and all surrounding circumstances.

Further in my view, contrary to what learned Counsel seemed to suggest to me, conduct of the parties herein and surrounding circumstances, all occurring not necessarily before but also after the signing of P4, that is the so-called joint venture agreement between the corporation and the developer could be considered and taken together with P4, for the Court's function was not solely and only confined to the interpretation of P4 but to the very larger question of whether the relation as defined by s. 3(1) aforesaid existed.

First, the major incident of the relation between the parties, was P4 and it fell to be considered. The Court was struck by the provision of 50% of the "profits of development" for the corporation as opposed to gross returns thus giving rise to a presumption of fact, that is *prima facie* evidence of partnership but I must hasten to add that this provision did not conclusively make the corporation a partner and all other relevant factors have to be considered equally and they could give rise to a contrary presumption of fact or could rebut the first mentioned presumption. The Court considered all the provisions in particular, the clause providing for sole financial responsibility of the developer (clause 2); the provision of vacant land by corporation; the joint appointment of contractors for the work (clause 7); joint appointment of architects, surveyors, etc. (clause 8); the sole responsibility of the developer for damage to third parties; (clause 9); the sole responsibility for insurance against various risks by the developer (clause 14); the approval in advance of estimates and specifications (clause 6); the reserved right of the corporation to inspect the project to ensure all compliance with all specifications (clause 22); the right of the corporation to inspect all books of accounts which were required to be properly kept and audited (clause 23).

The Court considered also the brochure distributed to potential house buyers with words in bold type announcing a 50/50 joint venture between the corporation as land owner and the developer as developer.

I considered also the evidence that the arrangement between the corporation and the developer had the motive behind that is that of helping Bumiputra entrepreneurs, Bumiputra companies and Bumiputra house buyers.

I also considered that questions raised in the State Legislative Assembly on the project which prompted, if not wholly, at least partly the decision to take over the development of the same project. to offer to complete the houses at an increased price, increased by 50%, which the plaintiffs, out of a very much larger number of other agreeable house buyers, refused to accept.

The Court also considered all goings-on after the corporation took over.

The Court at the conclusion of evidence was satisfied on a balance of probabilities that the indicia of partnership outweighed the negative factors and that the relation as defined in s. 3(1) of the Partnership Act was proved that is that a partnership existed between corporation and the developer limited to the business of housing development with all its attendant business of selling houses etc., limited also to the land, as described in P4.

I will now deal with the extraordinary situation which I referred to earlier and which I had subsequently taken into consideration in my brief oral judgment as delivered in Court.

It arose in this way. At one stage, it appeared that to all intents and purposes the developer had abandoned the housing scheme, for example, PW1, one of the plaintiffs, had said in evidence to the effect that after the end of 18 months from the date of the purchase agreement, (P1), when the building she bought was under P1 supposed to be built and completed, there was not even a brick here ..." "... there was only lallang ... At this stage or thereabouts, the corporation decided to take over the housing scheme by deciding to build houses there.

This was principally caused by the abandonment, and the motive according to evidence called for the corporation was that they felt bound to do so by a moral or social duty prompted to some extent by questions raised in Perak State Assembly about the sorry state in which the housing scheme in question was in.

When the corporation decided to take over the scheme, it called for some sort of tripartite agreement called "assignment agreement" to be signed by all the house buyers and the developer; with an increase in price over and above the contractual price set out in each of their earlier purchase agreements the plaintiffs had signed with the developer. Of the 313 house buyers, a large number had responded, leaving the present plaintiffs and a few more possibly, refusing to accept the offer and deciding to go to Court, and hence the multiple actions before me.

The increase of 50% in price was, (according to the corporation, and this had never been contradicted by the plaintiffs), caused by apparently superior specifications used by the corporation for building the houses as compared with those as set out in the purchase agreement of the developer, that is P1. The corporation said, without any contradiction from the plaintiffs, that in fixing the increase in price of 50%, it was below the prevailing market value at that time, possibly with reference to the aforesaid moral or social duty by which the corporation felt bound, though the corporation could not suppress, at least, a minor part played by certain unspoken reason in causing it to take over the housing scheme and fixing an increase in price below the prevailing market value; the reason being of course, that the abandonment of the scheme by the developer could potentially bring the corporation into the troubled waters of litigation.

The houses all had been built and completed subsequently by employing the new and more expensive specifications and since all the houses had been built and completed, the Court ordered specific performance in lieu of damages against the corporation also.

Consequent to my order of specific performance against the corporation *qua* partner of the developer, it would be obvious that the plaintiffs in the course of it, all stood to gain and enjoy a benefit, that is houses of superior quality by virtue of superior specifications. The Court could award a sum as the cost of additional work or expense by virtue of those specifications of the corporation but the Court's hands were somewhat tied, because of the lack of a pleaded counterclaim and the troubling scarcity of evidence of the actual cost involved in those specifications of the corporation.

However the question that kept occurring to my mind was; should the plaintiff gain more than what they had bargained for and get away with it? The corporation though owned by the State Government of Perak should not be regarded, to use local parlance, as a "milking cow" but just like another commercial company.

Law is magnanimous, for s. 71 of the Contracts Act 1950 provides:

> 71. When a person lawfully does anything for another person or delivers anything to him, not intending to do so gratuitously and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former, in respect of, or to restore the thing done or delivered.

Section 71 (hereafter this section) of our Contracts Act 1950 is the same as s. 70 of the Indian Contract Act and numerous cases have been decided in India under this section. I will refer to a few having bearing on this section. Thus in *Palanivelu v. Neelavathi & Anor.* AIR [1937] Journal, 50, the defendants and their sister (who was married to the plaintiff),

gave a promissory note for a certain sum of money carrying interest in consideration of plaintiff managing the estate left by the father of the defendants. On refusal to pay, the plaintiff sued on the promissory note which was however dismissed on the ground of undue influence, but the Privy Council upheld the alternative claim for compensation for services rendered, on the accepted finding that the plaintiff was under the impression that he would receive remuneration for his services and that he did not intend to perform such services gratuitously, and of course the defendants had enjoyed the benefit of such services.

In another case, *Gangapathi Pillai v. Budayasamy,* AIR (49) [1952], Madhya Pradesh; it was decided also under the same section. In that case, to give effect to the lease of mill granted by the defendant to plaintiff, defendant had to effect certain additional construction to the mill. The defendant failed to do so on account of lack of money and time. The plaintiff then did so and tried to recover the expense from the defendant on the ground that the defendant had agreed to reimburse the plaintiff. The trial Court found that the plaintiff had failed to prove the agreement to reimburse the plaintiff. On appeal the Appellate Court found that all the conditions under this section were fulfilled and the plaintiff was entitled to recover under this section even if the plaintiff had failed to prove the earlier agreement to reimburse the plaintiff. The same appellate Court held further to the effect the failure of the plaintiff to plead an alternative claim under this particular section did not at all debar the plaintiff from his claim under this section relying on the effect of the decision of the Indian Supreme Court case of *Subramanyam v. Thayyappa* [1961] 1 Mad. LJ, (SN), 30/SC).

When the corporation decided to take over the housing scheme, and build the houses according to their more expensive specifications, it did so in no way which could be conceivably unlawful. When it did so, it did not intend to do so gratuitously, for example the corporation attempted repeatedly to ask for an increase of 50% of the price. The plaintiffs had all gained and enjoyed the benefit of such specifications, thus, all the conditions in this section of the Contracts Act 1950 were fulfilled.

The plaintiffs could and would be heard to say elsewhere that if the corporation was liable as partner for the developer, the corporation could not increase the purchase price any more than the developer could, but in my view by saying so, it would be begging the question, brushing aside the extraordinary situation crying out for the invocation of this section of the Contracts Act set out above. Could the plaintiffs really justify it as some sort of windfall which was not created by them, this would be neither fair nor just.

I therefore decided not to order the payment of indemnity or "liquidated damages" for late delivery of the houses against the corporation, using the benefit the plaintiffs gained as a set-off against the plaintiffs' own claims for such indemnity provided for under the purchase agreement made by the plaintiffs with the developer. I ordered that such indemnity be awarded however against the developer, thus making a distinction between a defaulting trading partner and a sleeping partner who had subsequently given more to plaintiffs than what the defaulting trading partner had given. I did this in effect by disallowing the plaintiffs to insist on the strict performance of the contractual rights of the claim for the said liquidated damages for the late delivery of houses to the plaintiffs against the sleeping partner who had so given more than what the plaintiffs were entitled to.

I also had in mind a principle of the doctrine of equitable estoppel which in my view should apply and did apply equally, without the need to resort to this section above. This principle was explained in some detail in *Gan Tuck Meng & Ors. v. Ngan Yin Groundnut Factory Sdn. Bhd. & Anor.* [1990] 1 MLJ 227 and I repeat what Buckley, LJ said in *Shaw v. Applegate,* [1977] 1 WLR 970, about the arising of an equity or doctrine of equitable estoppel, that:

> ... the real test, I think, must be whether upon the facts of the particular case, the situation has become such, that it would be dishonest or unconscionable for the plaintiffs or the person having the right sought to be enforced, to continue to seek to enforce it.

The extraordinary situation described above was such that it would be unconscionable for the plaintiffs to insist on strictly enforcing the obligation providing for the payment of the said liquidated damages for late delivery of houses, and it was for this Court to decide how an equity should be satisfied.

I therefore ordered specific performance of all the agreements against both the developer (1st defendant) and the corporation (2nd defendant) but with an express order to the effect that the corporation (2nd defendant) need not pay indemnity for late delivery of houses provided by the agreements with all the usual directions as to payment and the execution of transfers of titles etc. and further costs against both developer and the corporation.

Also found at [1991] 3 CLJ 2834